SUPREME COURT OF FLORIDA

MARCUS JOHNSON,
Petitioner,

v.

Case No. SC05-1933
L.T. No. 2D05-2356

STATE OF FLORIDA,
Respondent.

TOMMY L. WILLIAMS,
Petitioner,

v.

Case No. SC05-1976
L.T. No. 2D05-2026

STATE OF FLORIDA,
Respondent

ON APPEAL FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA

CONSOLIDATED REPLY BRIEF OF PETITIONERS MARCUS JOHNSON AND TOMMY L. WILLIAMS

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ARGUMENT ON REPLY

As an initial matter, the State's arguments are entirely based on the current state of the rules of procedure and case law. This Court, however, is of course free to expand on prior precedent and apply its reasoning regarding Rule 3.850 in *State ex rel. Shevin v. District Court of Appeal, Third District*, 316 So. 2d 50 (Fla. 1975), to the Rule 3.800(a) context. Other than arguing that no current case or rule authorizes this, the State gives no reason why this Court should not take this opportunity to do so. That is exactly what the Petitioners requested in their initial brief. The State does not address, much less rebut, the policy arguments advanced in the initial brief. Thus, the Petitioners primarily rely on that brief.

Moreover, even if the Court were not inclined to extend *Shevin*, the existing state of the law, as argued by the State, requires reversal in both cases. The State incorrectly states that "none of the Petitioners alleged their appeals were untimely, due to the lack of notice, as in *Shevin*, but instead challenged that the failure of the trial court to advise them of the right to appeal the denial of their 3.800(a) motions, entitled them to a belated appeal." (Answer Br. at 9.) The State appears to concede that if the Petitioners had alleged that they were unaware of the right to appeal at all (e.g., they were not advised of their appellate rights by counsel or anyone else), then they would be entitled to a belated appeal. In other words, the

State's argument appears to be limited to situations where a petitioner had notice elsewhere, just not from the trial court.

The Petitioners *did* allege that their appeals were untimely due to the lack of notice. Mr. Johnson alleged that he "was not notifide [sic] of his right of (30) days to seek review by this Court." (App. 3.) He went on to cite Rule 9.141(c)(4)(A)(i), which he characterized as authorizing a belated appeal for a petitioner who "was not advise [sic] of right to appeal." (App. 3.) Thus, he clearly alleged that he did not know he had a right to appeal at all. Regardless of whether the trial court should have informed him of this right, his lack of any notice should entitled him to a belated appeal.

Admittedly, Mr. Williams cast his petition more in line of alleging a failure of the trial court to notify him of his right to appeal. Construing his pro se pleading liberally,[1] however, it appears that he lacked any notice. At the very least, he should be given the opportunity to demonstrate that he was not aware of his right to appeal at all – irrespective of the trial court's order.

[1] "Pro se motions are traditionally 'accorded liberal interpretation . . . to effect justice and afford the [movant] . . . the advantage denied him by his lack of legal training . . . .'" *Gust v. State*, 558 So. 2d 450, 453 (Fla. 1st DCA 1990); *see also Eichelberger v. Brueckheimer*, 613 So.2d 1372, 1373 (Fla. 2d DCA 1993) (noting that "pro se pleadings are entitled to liberal construction, and a petition will not be dismissed simply because it is mislabeled"); *accord Moore v. State*, 879 So. 2d 62, 63 (Fla. 4th DCA 2004); *Martinez v. Fraxedas*, 678 So. 2d 489, 491 (Fla. 3d DCA 1996).

Relying on the language of Rule 9.141(d)(4)(A)(ii), the State argues that the Petitioners have not demonstrated that they could not have ascertained their appellate rights "by the exercise of reasonable diligence." (Answer Br. at 11-12.) The State overlooks, however, that this requirement only applies to a petition for belated appeal filed more than two years after the expiration of the time to appeal. Both Petitioners filed their belated appeal petitions within two years, so they had no burden to prove that they could not have discovered their right to appeal with the exercise of diligence.

For these reasons, both appeals should be reversed even if this Court finds that a belated appeal is not automatically required by the mere failure of the trial court to explicitly advise the petitioner of the right to appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that I have delivered a copy of the foregoing by U.S. Mail to **Hon. Charles J. Crist, Jr.**, Attorney General, Office of the Attorney General, 400 South Monroe Street, # PL-01, Tallahassee, Florida 32399-6536, and **Tonja Rene Vickers**, Assistant Attorney General, Office of the Attorney General, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607-1793, attorneys for Respondent, this 29th day of March, 2006.

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Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief uses Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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Attorney